No. 92-2045

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In The Supreme Court Of The United States

OCTOBER TERM, 1992

JAMES B. HUNT, JR.,
GOVERNOR OF NORTH CAROLINA, et al.,
Petitioners,

v.

REPUBLICAN PARTY OF
NORTH CAROLINA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley

PATTON, BOGGS
& BLOW
P. O. Drawer 20004
Greensboro, NC 27401
(919) 273-1733

Counsel for Respondents
***Counsel of Record**

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

QUESTIONS PRESENTED

Since the reestablishment of Democratic party control over state politics after the Civil War, North Carolina has maintained a unique method of selecting its superior court judges. Candidates are nominated in party primaries from local judicial districts but are thereafter elected in partisan, statewide general elections. The use of this election method intentionally submerges Republican voters in the statewide Democratic majority. At the time this suit was brought, no Republican had been elected superior court judge in this century. In a federal court challenge to this discriminatory election structure, the following questions are presented:

1. Is a challenge to the state's method of electing superior court judges under the Equal Protection Clause of the Fourteenth Amendment barred by considerations of justiciability merely because the public officials elected are judges?

2. Is a complaint sufficient, under Davis v. Bandemer, to state an Equal Protection claim when it alleges, inter alia, that the discriminatory voting customs, practices, and procedures:

   (a) were established and are maintained with the intent and for the purpose of consistently degrading the influence of Republican voters on the political process as a whole;

   (b) have the effect of denying Republican voters an equal opportunity to elect judicial candidates of their choice;

   (c) have resulted in the virtual exclusion of Republicans from superior court judgeships for more than eight decades;

(d) have almost eliminated Republican candidate recruitment for superior court judgeships because of the widespread recognition that a campaign is hopeless and there is a resulting inability to raise campaign funds; and

(e) are an integral part of an overall political structure established and maintained by the state which consistently degrades the influence of Republican voters on the political process as a whole?

3. Is plenary consideration by this Court, before trial on the merits, appropriate when, as the Court of Appeals noted, "our conclusion that the [Republican Party of North Carolina] has set forth sufficient allegations of a violation of the Fourteenth Amendment to survive a motion to dismiss for failure to state a claim, we emphasize, is narrow and wholly dependent upon the egregious nature of the alleged systemic discrimination"?

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STATEMENT OF THE CASE

I. INTRODUCTION.

The procedure by which North Carolina elects its 82 superior court judges is indisputably unique among the states.[1] As a result, this case, while important to the parties, is limited to its peculiar facts and has little or no national legal significance warranting additional appellate review.

In North Carolina, nominees for superior court judge are selected in closed party primaries in local judicial districts, but must then run in a partisan statewide general

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[1] See Petition for Writ of Certiorari (hereinafter "Pet."), 7-8 n.8.

election. As noted infra at p. 5, the Petitioners ("NCSBE") concede that there is no statutory authority for the practice of nomination by local judicial district.[2]

Republican voters[3] comprise a voting majority in several judicial districts. In those districts, Republican voters routinely elect candidates for judicial offices that are nominated and elected solely in those districts, such as district court judges, district attorneys and clerks of court. At the same time, these Republican voters also provide local majorities for Republican candidates for superior court judge, but those local Republican majorities are predictably submerged and cancelled by the overall statewide Democratic majority. At the time of the filing of this lawsuit, because of the statewide general election procedure and other systematic discrimination against Republican voters, no Republican nominee had ever been elected to the office of superior court judge in modern times.

Given this stark pattern of consistent electoral defeat, political or racial minorities have brought three federal court challenges to the structural vote dilution inherent in this statewide election scheme. The first challenge, Holshouser v. Scott, 335 F. Supp. 928, 932-3

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[2] In fact, plaintiffs' complaint alleges that local nomination districts are part of a discriminatory scheme that is intended to and has the effect of degrading the influence of Republican voters on the political process as a whole. Complaint ¶ 27, appearing in the Appendix to this brief (hereinafter "App.") at 14a.

[3] Republican voters, as defined in ¶ 2 of the Complaint, App. 4a, include registered Republicans and those voters who, although not registered as Republicans, predictably vote for Republican candidates for superior court judge. Registered Republicans comprise 26% of registered voters. Republican nominees for superior court judge regularly command over 46% of the statewide vote. Complaint ¶ 32, App. 16a.

(M.D.N.C. 1971), aff'd mem., 409 U.S. 807 (1972), decided that the one person, one vote rule does not apply to the state judiciary and, in the absence of arbitrary and invidious action or distinctions between citizens and voters, the mere showing of a disparity in the population of the nomination districts is not sufficient to void the challenged procedure.

In 1987, African-American voters challenged the statewide election procedure under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. Alexander v. Martin, No. 86-1048-CIV-5 (E.D.N.C. Nov. 25, 1989). In direct response to that challenge, the state eliminated eight appointed Republican superior court judges[4] and created eight new nomination districts in which African-American citizens constituted a majority of the voting age population. Chapter 509 of the North Carolina Session Laws of 1987 ("Chapter 509"). Upon passage of this Act, the claims of the African-American community were settled by consent.

Because Chapter 509 maintained the politically discriminatory statewide general election procedure, the Republican Party of North Carolina and Republican voters ("RPNC"), the Respondents herein, filed this Equal Protection challenge, relying upon the pleading and evidentiary standards established by this Court in Davis v. Bandemer, 478 U.S. 109 (1986), and satisfying the proof of invidious discrimination foreshadowed by Holshouser.

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[4] Prior to 1987, eight special superior court judges were appointed by the governor, then a Republican. See N.C. Gen. Stat. § 7A-45, repealed by Chapter 509 of the Session Laws of 1987.

A unanimous panel of the United States Court of Appeals for the Fourth Circuit held that, under the unique facts of this case,

> [o]ur conclusion that the RPNC has set forth sufficient allegations of a violation of the Fourteenth Amendment to survive a motion to dismiss for failure to state a claim, we emphasize, is narrow and wholly dependent on the egregious nature of the alleged systemic discrimination.

Republican Party of North Carolina v. Martin, 980 F.2d 943, 958 (4th Cir. 1992); Appendix to Petition (hereinafter "Pet. App.") 33a. Defendants petitioned for rehearing and suggested rehearing in banc. Both were denied, by a vote of 8-3.[5] The instant Petition presents no new issues or principles of widespread application and should be denied.

II. STATE CONSTITUTIONAL AND STATUTORY BACKGROUND

Article IV, Section 16 of the Constitution of North Carolina directs that the "qualified voters" elect superior court judges for eight-year terms and provides that superior court judges may be elected by the qualified voters of the state, or by the voters of their districts, as determined by

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[5] Chief Judge Ervin disqualified himself from participating. Pet. App. 86a. Judge Phillips wrote a dissent in which no other judge joined. The Petitioners seek to bolster their argument here by the erroneous (but oft repeated) statement that the two other judges who voted for rehearing joined in his dissent. See Pet. 5, 14 n.11, 15 n.12, 19, 30.

the General Assembly.[6] Since 1875, despite this constitutional ability to choose election by districts, the General Assembly has determined that superior court judge elections must be statewide. North Carolina stands in stark relief as the only jurisdiction that elects trial judges of general jurisdiction by statewide vote. See State Court Organization, 1987, Tables 7 and 20 (1988) (National Center for State Courts). See also Pet. 7-8 n.8.

Since the adoption of partisan primaries by the Democratic-dominated General Assembly in 1915, the North Carolina State Board of Elections has implemented and maintained a system of local district primaries, although there is no statutory authority for this practice. See Martin, 980 F.2d at 947; Pet. App. 5a n.6. Candidates in the general election thereafter run on a statewide basis.

Article IV, § 9(1) of the North Carolina Constitution requires the General Assembly to "divide the State into a convenient number of superior court judicial districts . . ." The counties of the State of North Carolina are organized into four judicial divisions which, until 1987, were divided into a total of 34 judicial districts. Each division and judicial district then contained one or more counties and one or more resident superior court judges. Most of those judicial districts encompassed more than one

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[6] As is discussed more fully at pp. 11-13 infra, this constitutional choice between statewide and district elections effectively disposes of the Petitioners' arguments that there are no manageable standards for the selection of election districts, that the state has made a fundamental policy decision about the structure of its institutions which cannot be reviewed by a federal court and that the Court of Appeals' decision somehow infringes upon the principles of federalism. The people of North Carolina, every time they have had the opportunity to speak to the issue, have recognized district election of judges as a method of equal dignity to statewide election. In fact, from 1872-75, superior court judges were chosen by district election.

county and all districts followed county boundary lines. Seventeen of the judicial districts had more than one judge and those districts had 43 of the 60 resident superior court judges.

In 1987, African-American citizens brought a suit alleging that the system of electing superior court judges statewide had the purpose and effect of abridging non-white voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and of the Fourteenth Amendment. That litigation ended by a consent decree upon adoption by the General Assembly of Chapter 509. See Alexander v. Martin, No. 86-1048-CIV-5.

Pursuant to Chapter 509, eight of the then-existing judicial districts were divided into 26 subdistricts, solely to create eight nomination districts for African-Americans. In forming these new districts, counties frequently were split, and some districts now consist of bits of more than one county. Sixteen of the new judicial districts do not contain a courthouse and have no separate clerk of court, public defender, district court judge or other officials associated with traditional judicial districts, except for the resident superior court judge nominated therein. As a result, these new judicial districts have no role in the administration of justice and serve only as local partisan nomination districts.[7] See Complaint ¶ 20, App. 11a.

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[7] These districts were also designed to include an incumbent Democratic superior court judge in each district and to place existing Republican superior court judges (who had been appointed by the then-Republican governor to fill vacancies) into districts in which they did not reside and would thereby be ineligible to run for election. See Complaint ¶ 12, App. 8a-9a. That configuration, coupled with continued statewide election, is further evidence of the defendants' intent to perpetuate the Democratic dominance of the superior court judiciary.

During consideration of Chapter 509, Republican legislators offered amendments (which were supported by the then-Republican Governor) that would have eliminated the statewide election of resident superior court judges and, instead, would have provided for district election. Such district election would have remedied the degradation of both Republican and African-American voting strength. The Democratic majority, however, defeated all such amendments on party-line votes. On at least eight occasions since 1961, Republican members of the legislature have introduced and sought passage of various types of legislation to provide for district-based (or division-based) elections for superior court judges. The overwhelmingly Democratic General Assembly has defeated each effort. The Democratic majority defeated these bills and amendments to cancel out or minimize any opportunity for a Republican nominee to be elected to a superior court judgeship. See Complaint ¶ 21, App. 12a.

Before the enactment of Chapter 509, eight special superior court judges, who were appointed rather than elected (and, therefore, could be Republicans when there was a Republican governor), were available to hold court in districts where court overload or protracted or sensitive litigation required assistance from outside judges. Chapter 509, however, eliminated these judgeships, each of which was then held by a Republican.

The North Carolina Constitution mandates that, after they are elected, superior court judges rotate among the judicial districts in their respective judicial divisions. Rotation of superior court judges has been cited by the NCSBE as its principal "rational" justification for statewide

elections.[8] Pet. 3. From October 1, 1990, to April 1, 1991, however, the constitutionally required, and much vaunted, "rotation" feature was suspended by the North Carolina Administrative Office of the Courts.

In addition to mandated rotation, the Chief Justice may assign superior court judges to hold court outside their divisions, N.C. Const., art. IV, § 11, as these judges have statewide jurisdiction. N.C. Const., art. IV, § 12(3). Such assignment out of division is rare and only three percent of all assignments were out of division in the seven years before the filing of this action.

Only one Republican candidate for superior court judge has been elected in this century. The election of Republican Howard E. Manning, Jr., in November 1988, occurred one year after the filing of this action. No Republican has been elected since the District Court dismissed the action.[9]

In contrast to the election of superior court judges, state district court judges are elected within the judicial district in which they serve, even though they, too, have statewide jurisdiction. N.C. Const., art. IV, § 11. Between 1968 and 1986, the voters of nine judicial districts have elected Republican candidates for District Court judge in these district-wide elections. In the same time period, Republican candidates for superior court, Court of Appeals judgeships and state supreme court justices have out-polled

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[8] The constitutional requirement of rotation applies regardless of how judges are selected. Further, rotation cannot justify statewide election because the constitutional rotation is within judicial division, not statewide.

[9] There has been no election since the decision of the Court of Appeals.

their opponents in at least 14 judicial districts. On the plaintiffs' motion for preliminary injunction, their experts offered evidence that, if the superior court judgeships elections were conducted on a district, rather than statewide basis, Republican voters would have sufficient cohesive voting strength to elect Republican superior court judges in at least seven existing judicial districts.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THAT THE PLAINTIFFS' CLAIMS PRESENT A JUSTICIABLE CASE UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IN ACCORDANCE WITH THE CONTROLLING DECISION OF DAVIS V. BANDEMER.

A. Well-Developed and Familiar Judicial Standards Exist to Analyze Fourteenth Amendment Challenges to Elections in General.

In Davis v. Bandemer, 478 U.S. 109 (1986), this Court examined a claim that the legislative apportionment scheme in the State of Indiana diluted the votes of Democrats in violation of the Equal Protection Clause of the Fourteenth Amendment. Confronted with the question of the power of the courts to entertain a claim of political gerrymandering, this Court relied on decisions in which it

had adjudicated claims of racial gerrymandering[10] and concluded, in general terms, that a complaint of vote dilution "by a political group, rather than a racial group, does not distinguish it in terms of justiciability." 478 U.S. at 125.

Thus, despite the protests of the NCSBE, the issue of justiciability of claims of political gerrymandering has been decided, and this Court has recognized that Equal Protection claims properly may be advanced by political groups. The Fourth Circuit's determination that the complaint of the RPNC presented justiciable claims is entirely consistent with Bandemer.

The justiciability argument of the NCSBE is twofold: (1) the absence of judicially manageable standards to fashion a remedy should render this case non-justiciable, and (2) the Bandemer justiciability holding cannot be applied to a challenge outside the context of elected "representatives." These very points were rejected by the Court of Appeals and do not merit further review here.

The Court of Appeals properly examined the relevant criteria specified by this Court in Baker v. Carr, 369 U.S. 186 (1962), as did the six-justice Bandemer majority, and resolved that, in this case, the issues are not ones for resolution by a coequal branch of government, there is no risk of embarrassment or disturbance if the case is adjudicated and, because this Court has articulated

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[10] Justice White, author of the Bandemer analysis, recently noted, "Although Davis [v. Bandemer] involved political groups, the principles were expressly drawn from the Court's racial gerrymandering cases. See 478 U. S., at 131 n.12 (plurality opinion)." Shaw v. Reno, No. 92-357, 1993 WL 224459 at *22 n.3 (U.S. June 28, 1993) (White, J., dissenting). This observation is not disputed and was not affected by the majority opinion in Shaw.

guiding standards by which to resolve the issues presented, none of the other identifying characteristics of a "political question" case is present. Martin, 980 F.2d at 951; Pet. App. 13a-14a.

The NCSBE relies upon only one of the six factors identified in Baker, asserting that the lack of "recognized and judicially manageable standards" renders this case non-justiciable and that "a decision in the plaintiffs' favor necessarily would involve making a policy decision about the appropriate structure of the state's judicial elections."[11] Pet. 10-11. The Circuit Court rejected this argument, recognizing that "judicial standards under the Equal Protection Clause are well developed and familiar." Martin, 980 F.2d at 951; Pet. App. 15a, citing Bandemer and Baker.

Furthermore, the Circuit Court recognized that objections based upon speculations regarding a remedy are premature. "[Q]uestions pertaining to the goals and justifications offered by NCSBE for its scheme of electing superior court judges are not presently before us because they are not relevant to whether RPNC has stated a claim upon which relief may be granted." Martin, 980 F.2d at 953; Pet. App. 19a-20a. Even if, upon a finding of a violation, the legislature defaulted in its duty to remedy that

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[11] In contrast, federal courts in North Carolina have adjudicated Fourteenth Amendment challenges to state election statutes and procedures despite their inevitable impact on judicial elections. See Hendon v. North Carolina State Bd. of Elections, 633 F. Supp. 454 (W.D.N.C. 1986) (ballot counting rules); Greaves v. State Bd. of Elections, 508 F. Supp. 78 (E.D.N.C. 1980) (ballot access); North Carolina Socialist Workers Party v. North Carolina State Bd. of Elections, 538 F. Supp. 864 (E.D.N.C. 1982) (ballot access); New Alliance Party v. State Bd. of Elections, 697 F. Supp. 904 (E.D.N.C. 1988) (ballot access); Clayton v. North Carolina State Bd. of Elections, 317 F. Supp. 915 (E.D.N.C. 1970) (electioneering rules).

violation and the District Court was thereby compelled to fashion a remedy, the non-dilutive remedy sought by the RPNC (district-based elections) is specifically authorized by the North Carolina Constitution.[12] As a result, requiring elections on that basis would not involve any policy choice by the district court that has not already been approved by the people of North Carolina. The NCSBE's ominous assertion that relief, if ordered in this case, would result in a fundamental reconstruction of the state's judicial organization, Pet. 24-25, is baseless hyperbole, particularly given the express approval of the plaintiffs' form of relief in the state constitution.[13]

B. The Election of Judges is Analytically and Practically No Different From Any Other Election.

NCSBE's attempt to distinguish judges from other government representatives for gerrymandering purposes is equally unavailing. Throughout this litigation, the NCSBE has created a false dichotomy between the function of judges and other elected officials which should not divert the Court from appropriate constitutional analysis. While the NCSBE would limit constitutional protections to the context of elected representatives only, this Court has established that "the guarantee of equal voting strength for each voter applies in all elections of governmental officials. . . ." Hadley v. Junior College Dist. of Metro. Kansas City, Mo., 397 U.S. 50, 58 (1970).

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[12] See N.C. Const., art. IV, § 9(1).

[13] Moreover, the state itself readily consented to the creation of minority nomination districts in obtaining a settlement of Alexander v. Martin, evincing its recognition of that traditional means of remedying dilutive election mechanisms.

In Hadley, voters brought a Fourteenth Amendment challenge to the apportionment of local districts for the election of "trustees" who "conduct and manage the necessary affairs" of junior colleges. Because the trustees performed "important governmental functions," the voters were entitled to protection under the Fourteenth Amendment:

> This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions. Thus in the case now before us, while the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in the one crucial factor -- these officials are elected by popular vote.
>
> When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional

> distinctions should be drawn on the basis of the purpose of the election.

397 U.S. at 54-55 (footnote omitted).

As in the present case, the Hadley defendants attempted to avoid the plaintiffs' claims by raising the spurious distinction between elected officials who performed legislative duties, on the one hand, and those who performed other governmental functions, on the other hand. This Court forcefully rejected that argument, holding:

> whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election. . . .

397 U.S. at 56.

Although Hadley was a "one person, one vote case," the basic challenge there, as here, was to the denial of the "equal opportunity to participate" in the election of superior court judges. As one commentator has noted in this context: "If any set of offices, including judicial offices, is made elective, thus creating expectation of direct citizen control over the officers, how can it be just to give some voters more influence than others by the device of malapportionment?" R. Dixon, Democratic Representation, Reapportionment in Law and Politics 564 (1968) (emphasis in original). The premise of the NCSBE, if adopted, would sanction a legally and logically untenable result, permitting the state to maintain an invidiously discriminatory electoral system for the selection of any and all public

officials who are not legislators.[14] Such a conclusion falls far short of the constitutional necessity reinforced by Bandemer, that of equal voting power.

Two cases decided by this Court under the Voting Rights Act, 42 U.S.C. § 1973, Chisom v. Roemer, ___ U.S. ___, 111 S. Ct. 2354 (1991) and Houston Lawyers' Association v. Attorney General of Texas, ___ U.S. ___, 111 S. Ct. 2376 (1991), provide an authoritative definition and analysis of the term "representative" as used in the voting rights context.[15]

There, in the context of a Voting Rights Act claim, the Court reasoned that the term "representatives" describes "the winners of representative, popular elections."

> If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered "representatives" simply because they are chosen by popular election, then the same reasoning should apply to elected judges.

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[14] In North Carolina, such a group would include not only judges, but also elected clerks of court, registers of deeds, sheriffs and other elected state officials, none of whom is a representative in the legislative sense. See Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).

[15] The RPNC readily acknowledges that both of these cases were decided on statutory grounds. It would, however, be wholly inconsistent to hold that judges are "representatives" for purposes of the Voting Rights Act, which was passed to effectuate the commands of the Fifteenth Amendment, see Chisom v. Roemer, ___ U.S. ___, 111 S. Ct. 2354, 2362 (1991), but not for purposes associated with other constitutional amendments similarly invoked to protect the fundamental right to vote.

___ U.S. ___, 111 S. Ct. 2354 at 2366.[16]

The unequivocal and expansive reading of the term "representative" (making it synonymous with "elected governmental official," as this Court presaged in Hadley) should be applied to this case to effectuate -- and not to defeat -- the plaintiffs' fundamental right to vote. Surely if the method of electing a state's judiciary is subject to a challenge pursuant a congressional statute, it is also subject to challenge under the Fourteenth Amendment.

C. The Inapplicability of the "One Person, One Vote" Principle to the Election of Judges is a Question of Remedy, Not of Justiciability.

The Respondents recognize that, under Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), aff'd, 409 U.S. 1095 (1973), the one person, one vote requirement does not now apply to judicial elections. Wells did not hold, however, that all Fourteenth Amendment challenges to judicial selection schemes are barred. This Court has specifically recognized political gerrymandering claims that do not necessarily involve a one person, one vote remedy. For example, the districts Bandemer challenged met the one person, one vote standard. "The issue here . . . does not concern districts of unequal size." Bandemer, 478 U.S. at 124. It is not, therefore, surprising that one Circuit Court has articulated the need for alternative relief where a Fourteenth Amendment violation is found and a remedy based upon one person, one vote is not available.

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[16] In addition, the Court signaled that the well-established recognition that judges engage in policymaking indicates that judges should be treated like other elected policymakers. ___ U.S. ___ at ___, 111 S. Ct. at 2366 n.27.

In Voter Information Project, Inc. v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980), plaintiffs alleged that the at-large voting schemes of electing city judges invidiously diluted the voting strength of African-American citizens in violation of the Fourteenth and Fifteenth Amendments.[17] As in the present case, the district court dismissed the action for failure to state a claim upon which relief could be granted, basing its decision upon the principle that the one person, one vote remedy does not apply to the election of judges, and citing Wells. On appeal, the United States Court of Appeals for the Fifth Circuit held that the District Court had erred in dismissing the complaint:

> The problem with the District Court's opinion, however, is that it assumes the 'one man one vote' principle was the exclusive theory of the plaintiffs' complaints . . . .
>
> To hold that a system designed to dilute the voting strength of black citizens and prevent the election of blacks as Judges is immune from attack would be to ignore both the language and purpose of the Fourteenth and Fifteenth Amendments . . . . If plaintiffs can prove that the purpose and operative effect of such purpose of the at-large election schemes in Baton Rouge is to dilute the voting strength of black citizens, then they are entitled to some form of relief.

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[17] No Voting Rights Act claim was asserted in Voter Information Project; thus, the holding in that case is clearly based on the same constitutional principles at issue here.

612 F.2d at 211-12 (emphasis added). The Fifth Circuit properly took no position regarding what relief would be appropriate. 612 F.2d at 212 n.5.

The reasoning of Voter Information Project is persuasive. There, even though the one person, one vote principle did not apply, the Circuit Court permitted the plaintiffs to go forward to offer their proof that an at-large system of electing judges diluted their votes in contravention of the Fourteenth Amendment. Neither the judicial function of the elected judges nor the unavailability of the one person, one vote remedy justified dismissal or precluded the plaintiffs from presenting their case, as properly recognized by the Fourth Circuit in this case. Martin, 980 F.2d at 954; Pet. App. 23a-24a. Similarly, the present plaintiffs should be permitted to go forward. If they prevail, a remedy can then be considered. Logically, the question of remedy -- of any type -- cannot and should not determine justiciability. To permit post-trial considerations to govern threshold issues is simply premature.[18] See Martin, 980 F.2d at 953; Pet. App. 19a-20a.

Although Hadley was itself a one person, one vote case, the opinion indicated, in dicta, that the duties of some government officials may not always require a remedy involving one person, one vote principles under Reynolds v. Sims, 377 U.S. 533 (1964). Neither that dicta nor Hadley's reasoning in any way limits the holding which, still today, requires an "equal opportunity to participate" in the electoral process. In other words, while one person, one vote might not be the remedy for every Fourteenth

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[18] See also Connor v. Finch, 431 U.S. 407 (1977) (after a finding that an election scheme is unlawful, the legislature is entitled to an opportunity to create a lawful remedy).

Amendment violation, every such violation would nevertheless require some remedy.

D. Principles of Federalism do not Prevent Judicial Examination of the Plaintiffs' Claims.

The NCSBE insists that "[a]n order granting . . . relief would be an unprecedented assumption of a power to restructure a state's fundamental organization of its judiciary and would violate constitutional principles of federalism." Pet. 24. Implicit in this argument are two assumptions, both of which are incorrect.

First, this contention incorrectly assumes that a finding of a constitutional violation would necessarily be followed by a remedy imposed by a federal district court. In fact, the state legislature would have the initial opportunity to cure the violation. Connor v. Finch, 431 U.S. 407 (1977). Furthermore, the remedy sought is identical to the existing North Carolina constitutional provision which authorizes election by the voters of the respective districts. N.C. Const., art. IV, § 16. Finally, the changes embraced by the state in Chapter 509 to remedy the racial discrimination in Alexander v. Martin -- redrawing the boundaries of 26 judicial districts -- were far more intrusive than the remedy sought here -- election in the same districts as currently exist.

Second, the NCSBE's argument misapprehends the concept of federalism. The principles of federalism discussed in Gregory v. Ashcroft, ___ U.S. ___, 111 S. Ct. 2395 (1991) -- upon which the NCSBE relies -- involve the allocation of powers between the federal and state governments and limitations upon congressional authority to interfere with state sovereignty. The NCSBE is misguided in attempting to equate limits upon congressional

power to alter the form or the method of functioning of a state's government with limits upon the power of a federal court to entertain an Equal Protection claim. See Pet. 26. There is no principle of federalism that provides a prophylactic cloak to bar federal judicial scrutiny of a state's discriminatory manipulation of the election of its judiciary.

In fact, Rizzo v. Goode, 423 U.S. 362 (1976), cited by the Petitioners in support of the proposition that federalism "conditions and limits the power of federal courts to interfere with state governmental structures," Pet. 26, actually states that federal courts may in fact intervene, when a federal constitutional violation is present, "under the well-established rule that federal 'judicial powers may be exercised . . . on the basis of a constitutional violation.'" 423 U.S. at 377 citing Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1 (19[illegible] Similarly, the NCSBE's reliance upon Growe v. Emi[illegible] ___ U.S. ___, 113 S. Ct. 1075 (1993), is unavailing. T[illegible] case resolved a controversy that arose when ident[illegible] claims relating to a state's reapportionment process w[illegible] simultaneously asserted in state and federal courts. T[illegible] Court held that the federal district court erred in failing [illegible] defer to a state court's timely efforts to redraw legislat[illegible] and congressional districts. No similar issues are presented by the Petition in the present case. Finally, as explained above, any concerns about the possibility of federal intrusions should be allayed by the fact that, if the District Court here finds that North Carolina's statewide election scheme is unconstitutional, it will properly defer to the legislature to structure a remedy before imposing one. Connor v. Finch, 431 U.S. 407 (1977).

II. THE PLAINTIFFS HAVE PROPERLY STATED CLAIMS UPON WHICH RELIEF MAY BE GRANTED.

Consistent with Bandemer, the plaintiffs have properly stated a claim for relief under the Fourteenth Amendment. The plaintiffs allege "intentional discrimination against an identifiable political group." Bandemer, 478 U.S. at 127. Republicans in North Carolina are as much an identifiable group as Democrats were in Indiana.[19]

In addition to establishing the existence of an identifiable group, the plaintiffs have offered ample historical evidence of disproportionate electoral results coupled with a consistent pattern of invidious legislative decisions designed to disadvantage Republicans and other minority groups.[20]

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[19] The Petition challenges whether "Republican voters," as defined in ¶ 2 of the Complaint, can be identified "so that its numbers, hence its potential voting strength, can be determined; and the appropriate geographical areas within which its potential voting strength can be measured." Pet. 18, quoting Judge Phillips' dissenting opinion at Pet. App. 97a. Aside from the fact that such an assertion ignores the development of sophisticated political demography over the last 40 years, on a motion to dismiss, the allegations of the Complaint must be taken as true. Jenkins v. McKeithen, 395 U.S. 411 (1969). The Complaint clearly alleges that such identification can be and has been done. See ¶ 30, App. 15a.

[20] This Court discussed the types of proof available to plaintiffs to prove official discrimination under similar circumstances in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), a case involving allegations of racially discriminatory zoning decisions:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive

For over two hundred years, the state has used both direct and indirect methods to abridge the political rights of racial[21] and political[22] groups. This Court has participated in several attempts to remedy election practices and procedures maintained by the State of North Carolina to

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> inquiry into such circumstantial and direct evidence of intent as may be available . . . Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

429 U.S. at 266. See also 429 U.S. at 267 n.13. In addition, Arlington Heights provided a nonexclusive list of other types of proof that plaintiffs may properly use: historical evidence, legislative or administrative history, contemporary statements by members of the decision-making body and minutes of its meetings or reports.

[21] For a discussion of the history of official voting mechanisms designed to minimize or cancel the potential voting strength of minority citizens in North Carolina, see Gingles v. Edmisten, 590 F.Supp. 345, aff'd in part, rev'd in part sub nom Thornburg v. Gingles, 478 U.S. 30 (1986).

[22] Some examples of official voting mechanisms designed to minimize or cancel the potential voting strength of minority political groups in North Carolina include:

- party loyalty oaths (see Clark v. Meyland, 261 N.C. 140, 134 S.E.2d 168 (1964));
- ballot counting rules that unlawfully prevented cross-over voting, found to disadvantage Republican candidates and voters (see Hendon v. North Carolina State Bd. of Elections, 710 F.2d 177 (4th Cir. 1983)); and
- ballot position rules that favor Democrat candidates (see N.C. Gen. Stat. § 163-140.1).

deny full exercise of the fundamental right to vote. See Drum v. Seawell, 249 F. Supp. 877 (M.D.N.C. 1965), aff'd, 383 U.S. 831 (1966) (apportionment of the state for the election of members of the legislature and representatives to Congress was unconstitutionally discriminatory and therefore void); Gaston County, North Carolina v. United States, 395 U.S. 285 (1969) (use of a literacy test as a prerequisite to registering to vote has the effect of denying or abridging the right to vote on account of race or color); Thornburg v. Gingles, 478 U.S. 30 (1986) (multi-member districts found to dilute the votes of minority voters); Shaw v. Reno, No. 92-357, 1993 WL 224459 (U.S. June 28, 1993) (congressional reapportionment scheme is so irrational on its face that it can be understood only as an effort to segregate voters on the basis of race).

Over time, successful Fourteenth Amendment challenges have altered the nature of some of the discriminatory election schemes imposed by the State of North Carolina, but they have not been eliminated entirely. As a result, recent legislatures changed past methods of overt discrimination to a less blatant approach. For example, the notorious "grandfather clause" of 1900 -- conspicuously designed to disenfranchise African-American voters -- gave way to more discrete poll taxes and literacy requirements. See generally Lefler and Newsome, North Carolina, The History of a Southern State (1973). Later still, "numbered seat" and "anti-single shot" laws, while facially neutral, operated to discriminate against minorities. See Dunston v. Scott, 336 F. Supp. 206 (E.D.N.C. 1972).

As a part of this historical backdrop, North Carolina Republicans have been effectively excluded from the superior court judicial selection process. More than four decades ago, in the most comprehensive and authoritative study of politics in the American South, Professor V.O.

Key recognized and documented every element of proof required of the plaintiffs in this action:

> The west[ern part of North Carolina], however, elects virtually all the Republican legislators and local officials. There Democrats must gerrymander to keep Republican victories to a minimum.
>
> * * *
>
> Western Democrats are grateful also for such fortuities of North Carolina politics as the election of circuit [superior court] judges by the state at large. Democratic nominees, selected in primaries held by districts, some of which unavoidably contain large numbers of Republicans, are elected by the party's majority in the state as a whole.

V.O. Key, Southern Politics in State and Nation, 220, 226 (1949).[23]

The NCSBE asserts that, in order to succeed in a political gerrymandering claim, plaintiffs must allege that they have been completely shut out of the political process as a whole. There is no dispute that, under Bandemer, a political gerrymandering claim must allege: (1) intentional discrimination against an identifiable political group, 478 U.S. at 127, (2) an actual discriminatory effect on that group, Id., and (3) that the challenged election system is

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[23] The RPNC acknowledges the anomalous election of one Republican candidate to the office of superior court judge in November, 1988. One electoral victory in eighty-eight years does not offer any evidence of a fair selection process. As this Court noted, it is proper to consider the effect of the pendency of this litigation in assessing the significance of this single electoral success. See Thornburg v. Gingles, 478 U.S. 30, 75-76.

arranged in a manner that will consistently degrade the plaintiffs' influence on the political process as a whole. 478 U.S. at 132. The NCSBE challenges the panel's opinion only with regard to the final prong of Bandemer, contending that, in order to meet the third requirement, "plaintiffs must be able to allege exclusion from the state's political life as a whole, and not simply lack of success in the particular electoral system they are challenging." Pet. 29.

The Court of Appeals correctly concluded that the RPNC "set forth allegations of an actual discriminatory effect sufficient to state a claim of vote dilution brought about by political gerrymandering." Martin, 980 F.2d at 958; Pet. App. 33a. In a straightforward fashion, the Circuit Court opinion considered whether Bandemer requires plaintiffs to plead total exclusion from the political process and "declin[ed] to adopt a construction of Bandemer that would render nugatory [this Court's] holding that political groups may bring claims of partisan gerrymandering." Id.; Pet. App. 32a.

Although certain district courts have construed the "political process as a whole" language narrowly to restrict political gerrymandering claims,[24] the better guide to its meaning is the real-life political arena in the State of Indiana, from which Bandemer arose. In Bandemer, Indiana Democrats had clearly enjoyed electoral success in state legislative elections.[25] That success, however, was

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[24] See Pet. 30-31.

[25] In fact, under the plan challenged in Bandemer, Democratic candidates for the Indiana State House of Representatives received 51.9% of the votes cast statewide and won 43 of 100 seats. In the Senate, 53.1% of the votes were cast for Democratic candidates; of the 25 Senate seats to be filled, Republicans won 12 and Democrats 13.

not sufficient to bar the Democrats' challenge to legislative districting, because the Democrats' voting strength was significantly diminished by the intentional discrimination practiced by the defendant Republicans.[26] Because an even more severe diminution has been pled by the RPNC, a rejection of this complaint, based on the NCSBE's construction of Bandemer, would effectively reject its holding.

III. THERE IS NO CONFLICT IN THE CIRCUITS ON ANY QUESTION SUFFICIENT TO WARRANT THIS COURT'S GRANT OF CERTIORARI.

Notwithstanding the indisputably unique facts of this case, the NCSBE asserts the existence of a serious conflict between the Fourth Circuit in the present case and the holdings of lower courts that have considered claims of political gerrymandering since Bandemer. No such conflict warranting examination by this Court exists. In each previous case cited by the Petitioners, there was either a failure to plead or to prove a consistent degradation of the influence of a cognizable group on the political process as a whole. As shown below, in every case cited, plaintiffs raised gerrymandering claims against plans under which significant numbers of the minority party had been elected to the very office under challenge. In contrast, Republican votes in the present case have effectively been cancelled entirely by the challenged election mechanism.

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478 U.S. at 134.

[26] This Court ultimately dismissed the Democrats' claims in Bandemer because their proof included only a single election, thereby failing to establish discriminatory effect over time. 478 U.S. at 135. In contrast, here plaintiffs have pled a century of being shut out of judicial elections.

In Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988), aff'd mem., 488 U.S. 1024 (1989), California Republicans alleged political gerrymandering in the redistricting of that state's congressional seats, 40 percent of which were held by Republicans. The Badham court dismissed the complaint specifically because of its failure to make factual allegations regarding California Republicans' role in the political process as a whole. 694 F. Supp. at 670.

In Holloway v. Hechler, 817 F. Supp. 617 (S.D. W. Va. 1992), aff'd mem., ____ U.S. ____, 113 S. Ct. 1378 (1993), a challenge by Republicans to West Virginia's legislative apportionment on political gerrymandering (and other) grounds, the court found that the plaintiffs' evidence at trial failed to prove "intentional discrimination against an identifiable political group" and that any gerrymandering that may have occurred was merely de minimis. 817 F. Supp. at 628. At the time of the ruling, 26 of 100 delegates to the West Virginia House of Delegates were Republicans.

Pope v. Blue, 809 F. Supp. 392 (W.D.N.C.), aff'd mem., ___ U.S. ___, 113 S. Ct. 30 (1992), presented a political gerrymandering challenge to North Carolina congressional districts. The district court held that the Republicans' complaint failed to meet Bandemer's requirement for alleging discriminatory effect. "The plaintiffs do not allege, nor can they, that the state's redistricting plan has caused them to be 'shut out of the political process.'" 809 F. Supp. at 397. At the time Pope was filed, four of North Carolina's 11 members of Congress were Republicans.

No pleading defect was identified in Fund for Accurate and Informed Representation v. Weprin, 796 F. Supp. 662 (N.D.N.Y.), aff'd mem., ____ U.S. ___, 113

S. Ct. 650 (1992). There, the court denied a pretrial motion to dismiss a political gerrymandering claim. Fund for Accurate and Informed Representation v. Weprin, No. 92-CV-283, slip op. (N.D.N.Y., May 28, 1992) (three-judge court). The panel stated that the complaint:

> sets forth in more than adequate detail allegations of intentional discrimination and significant harms this plan allegedly will cause. . . . we think the increased particularity in pleading required under Bandemer has been satisfied and we cannot conclude beyond doubt that plaintiffs can prove no set of facts upon which relief might be warranted under the Constitution.

Id. at 9-10.

Subsequently, however, the plaintiffs' proof of their case on the merits failed to establish liability. "Plaintiffs' evidence, even when considered in its most persuasive light, falls short of proving that the Assembly apportionment plan deprives Republicans of an opportunity to 'influence [New York State's] political process as a whole.'" 769 F. Supp. at 669 (emphasis added). Republicans held a majority of the New York state senate seats at that time.

In sharp contrast to the decisions in Badham, Pope and Holloway, the RPNC's complaint does "contain allegations of an effect that goes beyond mere disproportionate election results," Martin, 980 F.2d at 957; Pet. App. 30a, and which "are sufficient in number, detail, and variety of particulars to avoid the problem of repetitive or conclusory statements." Martin, 980 F.2d at 957 n.26;

Pet. App. 30a n.26.[27] In considering a motion to dismiss, it is axiomatic that these allegations of the complaint should be considered to be true and should be construed in the light most favorable to the plaintiffs. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley

Patton, Boggs & Blow
P.O. Drawer 20004
Greensboro, NC 27401
(919) 273-1733

Counsel for Respondents
*Counsel of Record

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[27] The plaintiffs have made numerous detailed allegations of intentional discrimination and exclusion from the political process as a whole in meeting the Bandemer pleading requirements. See Complaint ¶¶ 27-48, App. 14a-24a.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
GREENSBORO DIVISION

REPUBLICAN PARTY OF NORTH CAROLINA, BRUCE BRIGGS, WILLIAM R. SIGMON, MARVIN K. GRAY, R. HOWARD RIDDLE, LLOYD FOWLER JOE R. WILSON, R. WALTER WHITE, EDGAR A. READLING, JR., FREDERIC M. GALLAGHER, and RALPH A. WALKER,	)	Civil Action No. C-87-779-G
Plaintiffs,	)	**COMPLAINT**
vs.	)	
JAMES G. MARTIN, Governor of North Carolina; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; ROBERT N. HUNTER, JR., Chairman of the North Carolina State Board of Elections, THOMAS A. FARR, WILLIAM A. MARSH,	)	**[FILED - NOVEMBER 4, 1987]**

JR., RUTH TURNER)
SEMASHKO, and)
JUNE K. YOUNGBLOOD,)
members of the)
North Carolina)
State Board of)
Elections, DURHAM)
COUNTY BOARD OF)
ELECTIONS, FORSYTH)
COUNTY BOARD)
OF ELECTIONS, and)
GUILFORD COUNTY)
BOARD OF ELECTIONS,)
)
Defendants.)
)

Plaintiffs, complaining of the Defendants, allege and say:

INTRODUCTION AND SUMMARY

This case is brought under the First and Fourteenth Amendments to the United States Constitution. It challenges the voting custom, practice or procedure of district nomination followed by statewide election of state resident Superior Court judges in that (1) statewide election was and is maintained for the purpose and has the effect of restricting the free exercise of the fundamental rights of freedom of speech and association because it penalizes Republican Voters (as defined herein) solely because of their party affiliation, political beliefs and associations and chills public debate on issues of public importance and (2) it consistently degrades the influence of Republican Voters on the political process as a whole.

This cas also challenges the voting custom, practice or procedure of "numbered posts" for resident Superior Court judgeships as a result of which candidates may run only for a judgeship for a particular judicial district, rather than running at-large for all resident Superior Court judgeships which are up for election in a given year. Such voting custom, practice or procedure has no state statutory authority and was implemented and was and is maintained for the purpose and has the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

This case also challenges the district nomination process which is an integral part of the "numbered post" system. There is no state statutory authority for district, rather than statewide, nomination of Superior Court judges. The district nomination process in combination with statewide election was implemented and was and is maintained for the purpose and has the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

Finally, this case also challenges the recently enacted requirement that candidates for resident Superior Court judge must reside in the district for which they seek election. Such voting custom, practice or procedure is contrary to the Constitution of North Carolina and was implemented and was and is maintained for the purpose and has the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

The four voting customs, practices and procedures challenged in this case, in conjunction with other facts alleged herein, result in the overwhelming predictability of the success of Democratic candidates for resident Superior

Court judge and constitute the structural dilution of the voting franchise of Republican Voters.

The relief sought is a declaration establishing and protecting plaintiffs' constitutional rights, a preliminary and permanent injunction prohibiting the defendants from conducting elections for resident Superior Court judge under the existing system, and an order that such elections shall be conducted by judicial district for both nomination and general election (without a candidacy residency requirement) in such a fashion that does not unlawfully discriminate against Republican candidates and Voters. Plaintiffs also pray that the Court award to the plaintiffs the costs of this action, including reasonable attorneys' fees.

JURISDICTION

1. Jurisdiction is conferred upon the Court by 28 U.S.C. §§1343(3) and (4) and plaintiffs have a right to bring this suit pursuant to 42 U.S.C. §§1981, 1983 and 1988. Plaintiffs also seek declaratory relief pursuant to 28 U.S.C. §§2201 and 2202.

PARTIES

2. Plaintiff Republican Party of North Carolina (the "NCGOP") is a statutorily recognized political party with elections and other activities throughout the State of North Carolina. The NCGOP represents and promotes the interests of both voters who are registered as Republicans and voters who, although not registered as Republicans, predictably vote for Republican candidates (taken together, hereinafter referred to as "Republican Voters").

3. Plaintiff Bruce Briggs is a registered Republican Voter in the 24th Judicial District. In 1984, he was

the Republican candidate for resident Superior Court judge for the 24th Judicial District. In that election, he received a statewide total of 868,201 votes and his Democratic opponent received a total of 1,017,819 votes. In the 24th Judicial District, however, Plaintiff Briggs received 20,170 votes and his Democratic opponent received only 17,464 votes. But for the requirement of statewide election of resident Superior Court judges imposed by the defendants or their predecessors in office, Plaintiff Briggs would have been elected.

4. Plaintiff William R. Sigmon is a registered Republican Voter in what was the 25th Judicial District. [The Superior Court judicial districts were extensively modified by Chapter 509 of the Session Laws of 1987. N.C.G.S. §7-A-41. See the allegations of paragraphs 12, 20 and 21, infra.] In 1968, he was the Republican candidate for resident Superior Court judge for what was then the 25th Judicial District. In that election, he received a statewide total of 589,361 votes and his Democratic opponent received a total of 798,484 votes. In what was then the 25th Judicial District, however, Plaintiff Sigmon received 39,751 votes and his Democratic opponent received only 32,536 votes. But for the requirement of statewide election of resident Superior Court judges imposed by the defendants or their predecessors in office, Plaintiff Sigmon would have been elected.

5. Plaintiff Marvin K. Gray is a registered Republican Voter in what was the 26th Judicial District. In 1986, he was appointed a resident Superior Court judge for that district to fill and unexpired term. In 1986, he was the Republican candidate for one of two resident Superior Court judgeships for what was then the 26th Judicial District. In that election, he received a statewide total of 627,539 votes and his two Democratic opponents, Robert

Burroughs and W. Terry Sherrill, received a total of 785,816 votes and 793,428 votes, respectively. In what was then the 26th Judicial District, however, Plaintiff Gray received 49,135 votes, Burroughs received only 42,825 votes and Sherrill received only 44,753 votes. But for the requirement of statewide election of resident Superior Court judges imposed by defendants, Plaintiff Gray would have been elected.

6. Republicans who are potential candidates for resident Superior Court judge are aware of the election statistics recited in paragraphs 3 through 5 hereof. As a result thereof, they are chilled or prevented from offering themselves as candidates for resident Superior Court judge and the electorate is thereby deprived of choice in the selection of resident Superior Court judges.

7. Plaintiff R. Howard Riddle is a registered Republican Voter in Madison county in the 24th Judicial District. In 1984, he voted for Bruce Briggs for resident Superior Court judge for the 24th Judicial District. For many years, he has been affiliated with the Republican Party, has voted for the Republican candidates for resident Superior Court judge and other offices and intends to do so in the future. Because of the custom or practice of statewide election of resident Superior Court judges imposed and maintained by the defendants and their predecessors in office, he has been and is deprived of his ability to participate equally in the political process and to elect judges of his choice and his influence on the political process as a whole has been and is consistent degraded.

8. Plaintiffs Lloyd Fowler and Joe R. Wilson are registered Democratic Voters in Madison County in the 24th Judicial District. In 1984, they voted for Bruce Briggs for resident Superior Court judge for the 24th

Judicial District. For many years, they have been affiliated with the Democratic Party, by they have voted for the Republican candidates for resident Superior Court judge and other offices and intended to do so in the future. Because of the custom or practice of statewide election of resident Superior Court judges imposed and maintained by the defendants and their predecessors in office, they have been and are deprived of their ability to participate equally in the political process and to elect judges of their choice and their influence on the political process as a whole is consistently degraded.

9. Plaintiff R. Walter White is a registered Republican Voter in Davie County in the 22nd Judicial District. In 1968, he voted for Arthur S. Beckham, Jr., for resident Superior Court judge for the 22nd Judicial District (see the allegations of paragraph 35, infra). For many years, he has been affiliated with the Republican Party, has voted for Republican candidates for resident Superior Court judge and other offices and intends to do so in the future. Because of the custom or practice of statewide election of resident Superior Court judges imposed and maintained by the defendants and their predecessors in office, he has been and is deprived of his ability to participate equally in the political process and to elect judges of his choice and his influence on the political process as a whole has been and is consistently degraded.

10. Plaintiff Edgar A. Readling, Jr., is a registered Republican Voter in Catawba County in what was the 25th Judicial District. In 1968, he voted for William R. Sigmon for resident Superior Court judge for what was then the 25th Judicial District. For many years, he has been affiliated with the Republican Party, has voted for the Republican candidates for resident Superior Court judge and other offices and intends to do so in the future.

Because of the custom or practice of statewide election of resident Superior Court judges imposed and maintained by the defendants and their predecessors in office he has been and is deprived of his ability to participate equally in the political process and to elect judges of his choice and his influence on the political process as a whole has been and is consistently degraded.

11. Plaintiff Frederic M. Gallgaher is a registered Republican Voter in Mecklenburg County in what was the 26th Judicial District. In 1986, he voted for Marvin Gray for resident Superior Court judge for what was then the 26th Judicial District. For many years, he has been affiliated with the Republican Party, has voted for the Republican candidates for resident Superior Court judge and other offices and intends to do so in the future. Because of the custom or practice of statewide election of resident Superior Court judges imposed and maintained by the defendants, he has been and is deprived of his ability to participate equally in the political process and to elect judges of his choice and his influence on the political process as a whole has been and is consistently degraded.

12. Plaintiff Ralph A. Walker is a registered Republican Voter in Guilford County in what was the 18th Judicial District. He is currently serving as a resident Superior Court Judge in what is now called the 18th-B Judicial District, having been appointed by the Governor to replace Edward K. Washington who retired. Plaintiff Walker resides in what is now called the 18th-E Judicial District. Pursuant to Section 13 of Chapter 509 of the Session Laws of 1987 [G.S. §163-106(i)], Plaintiff Walker is prohibited from running for election for the judgeship which he now holds because he is not a resident of the so-called 18th-B Judicial District. This residency requirement was implemented for the purpose and has the effect of

BEST AVAILA

preventing Republicans from being successful candidates for Superior Court judge. Attached to this complaint as Exhibit B [omitted] and incorporated herein by reference is a letter from Leslie J. Winner, Esquire, in connection with this allegation and which states that "the restriction of candidate residence was articulated . . . to prevent wealthy white Republican lawyers from being able to [run-in] . . . the black election districts." Thus, the residency requirement was solely and directly intended to discriminate against Republican candidates and Voters.

13. The Defendant James G. Martin is the Governor in and for the State of North Carolina and, in such capacity, is the Chief Executive Officer of the State charged with the duty of enforcing compliance with state legislation under Article II, Section 5(4) of the Constitution of North Carolina.

14. The Defendants Robert N. Hunter, Jr., Thomas A. Farr, William A. Marsh, Jr., Ruth Turner Semashko, and June K. Youngblood are the members of the North Carolina Board of Elections, the Defendant Robert N. Hunter, Jr., being the Chairman of said Board, all of said defendants being charged with exercising the powers and duties of the State Board of Elections pursuant to N.C.G.S. §163-22

15. The Defendants Durham County Board of Elections, Forsyth County Board of Elections and Guilford County Board of Elections are local boards of elections established pursuant to N.C.G.S. §163-30. These defendants have the duty and authority, pursuant to N.C.G.S. §163-33 and N.C.G.S. §163-109, to prepare, print distribute and count the ballots for the primary election for Superior Court Judge. These defendants are integral parts of the voting customs, practices and procedures complained

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of herein and on information and belief, these defendants will perform their duties and exercise their powers in the manner complained of herein. In particular, the defendants will conduct primaries which constitute a district, rather than a statewide nomination process and will require candidates to run for "numbered posts." In addition, the Defendant Guilford county Board of Elections will refuse to allow Plaintiff Walker to run as a candidate in the primary for Superior Court Judge for the so-called 18th-B Judicial District.

16. By performing their respective duties with regard to the challenged statutes, electoral system, voting customs, practices and procedures or processes and nomination districts, defendants and each of them, in their respective official capacities, act under color of state statutes, ordinances, regulations, customs and uses of the State of North Carolina which have the purpose of and have resulted and will result in a deprivation of the rights guaranteed to the plaintiffs, as Republican Voters and candidates, by the Constitution and laws of the United States.

VENUE

17. Venue in the United States District Court for the Middle District of North Carolina is proper under 28 U.S.C. §1392.

NOTICE

18. Pursuant to N.C.G.S. §1-260, notice of this action has been given to the Attorney General of the State of North Carolina by sending him a copy of this Complaint via certified mail.

FACTS

19. The counties of the State of North Carolina are organized into four (4) judicial divisions which, until 1987, were divided into a total of 34 judicial districts. Each division and judicial district had the counties and the number of residents Superior Court judges set forth in the table attached hereto as Exhibit A-1 [omitted]. Most of the judicial districts encompassed more than one county and all district followed county boundary lines. Seventeen of the judicial districts had more than one judge and these districts had 43 of the 60 resident Superior Court judges.

20. Pursuant to Section 1 of Chapter 509 of the Session Laws of 1987 (hereinafter referred to as "Chapter 509") (N.C.G.S. §7A-41), many of these Judicial Districts were split and there are now 70 so-called Judicial Districts. In the case of seven old Judicial Districts, they were split into sub-districts which are called judicial districts but which, in reality, have no legitimate judicial function or purpose. The divisions and judicial districts, geographical areas included therein and the number of Superior Court judges in each are set forth in the table attached hereto as Exhibit A-2 [omitted]. The new so-called Judicial Districts frequently split counties or consist of partes of more than one county. Sixteen of the new so-called Judicial Districts do not contain a courthouse and have no separate Clerk of Court or other official of a true judicial district, except for the resident Superior Court judge assigned thereto. Chapter 509 established and maintains Judicial Districts solely for the purpose of perpetuating in office the existing Superior Court judges who are all Democrats (with the exception of three who have been appointed by the Governor), ensuring that black Democrats are elected Superior Court judges in some sub-districts and perpetuating the degradation of the influence of Republican Voters on the

political process as a whole and the structural dilution of the voting franchise of Republican Voters.

21. In its consideration of Chapter 509, the General Assembly had presented to it amendments offered by Republican legislators and supported by the Republican Governor which would have eliminated the statewide election of resident Superior Court judges and, instead, would have provided for district election in accordance with the relief prayed for herein. Such amendments were defeated by the overwhelming Democratic majority, on party line votes. Chapter 509 continues statewide election and the other voting customs, practices and procedures complained of herein for the purpose and with the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

22. The total number of resident Superior Court judges, the composition of the divisions and judicial districts and the assignment of judges to districts was not established by the North Carolina Constitution or General Assembly at any one particular time, but has resulted from various acts passed from time to time increasing the number of judges in a given district or establishing new districts or divisions.

23. The method of selection of resident Superior Court judges has not been consistent in the historical past, the same having varied from (a) appointment by the Governor for life or for a term, (b) election by the General Assembly and (c) election by the people. Since 1968, the Constitution of North Carolina has provided that resident Superior Court judges "may be elected by the qualified voters of the State or by the voters of their respective districts, as the General Assembly may prescribe." N.C. Const. Art. IV, Sec. 16.

24. The geographical areas served by resident Superior Court judges have not been constant in the historical past, the same having varied from (a) rotation throughout the entire state, (b) rotation within a division and (c) service in and for only one judicial district. Since 1915, resident Superior Court judges have rotated within a judicial division. Although resident Superior Court judges may, upon proper commissioning, exercise their authority throughout the state, only rarely are they assigned outside their division. Resident Superior Court judges exercise numerous unique statutory powers in the judicial district for which they are elected.

25. By custom or practice imposed and maintained by defendants and their predecessors in office, resident Superior Court judges are nominated by judicial district, although there is no statutory requirements to this effect. In fact, a fair and impartial reading of the North Carolina election laws would lead to the conclusion that resident Superior Court judges should be nominated statewide. In particular, N.C.G.S. §163-1(a) provides that:

> elections for the officers listed in the tabulation contained in this section shall be conducted in all election precincts of the territorial units specified under the column headed "Jurisdiction" . . . ."

The relevant section of the tabulation is as follows:

"Office	Jurisdiction
* * * *	
Judges of Superior Court	State"

N.C.G.S. §163-1(b) makes subsection (a) and the above-quoted table applicable to primaries.

26. Resident Superior Court judges are then selected from these nominees by statewide vote pursuant to N.C.G.S. §163-1(a). Nowhere in this section is thee any requirement that candidates for resident Superior Court judge run for a specific judgeship for a particular judicial district. Rather, a fair and impartial reading of this section would require all candidates for resident Superior Court judgeships to run at-large for all available seats, with the top votegetters being successful as to the number of judgeships being elected in a particular year. The only requirement is that, once elected, resident Superior Court judges must reside in the judicial district for which they are elected. N.C. Const. Art. IV §9(1).

27. The voting custom, practice or procedure of district, rather than statewide, nomination of resident Superior Court judges, together with the voting custom, practice or procedure of requiring candidates for resident Superior Court judge to run for a specific judgeship for a particular judicial district, constitutes a "numbered post" system, established and maintained for the purpose and having the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

28. Plaintiffs named or described in Paragraphs 3 through 7, and 9 through 12 are registered Republicans, are affiliated with the North Carolina Republican Party and are associated with others similarly situated across the State of North Carolina to advance and advocate commonly held policies and beliefs by, among other things, supporting and voting to elect Republican Candidates for resident Superior Court judge and thereby to transform mutually held beliefs into public policies. Each such plaintiff predictably votes

for Republican Candidates for public office, including resident Superior Court judge.

29. Plaintiffs named in Paragraph 8 are registered Democrats but, because they share and desire to advance and advocate policies and beliefs held by Republicans, they support and vote in general elections to elect Republican candidates for resident Superior Court judge and thereby to transform such mutually held beliefs into public policies. Such plaintiffs predictably vote in general elections for Republican candidates for public office, including resident Superior Court judge.

30. In North Carolina, there are identifiable groups of voters whose voting behavior is consistent and can be ascertained from past elections and predicted in future elections with reasonable accuracy. Republican voting strength in specific geographical areas, particularly judicial districts, can be so ascertained and predicted. The core of Republican strength is registered Republicans, such as the plaintiffs named in Paragraphs 3 through 7 and 9 through 11, to which are added others who, although not registered Republicans, predictably and do in fact vote for Republican candidates, such as the plaintiffs named in Paragraph 8. The geographical distribution in North Carolina of this group of Republican Voters is sufficiently ascertainable by judicial district that it could have been, was, can be and is taken into account in the intent and purpose by which defendants and their predecessors in office have instituted, maintained and maintain the voting customs, practices and procedures complained of in this action. The same facts are true of Democratic voting strength.

31. Plaintiffs are an identifiable, quantifiable and politically salient group of voters whose voting behavior

can be ascertained and predicted with reasonable accuracy. Plaintiffs are Republican Voters who in fact vote for Republican candidates and will predictably do so in the future. Plaintiffs and other Republican Voters have suffered harm and irreparable injury because the voting customs, practices and procedures complained of herein operate, and were and are intended to operate, to minimize or cancel their votes and voting strength. Plaintiffs' votes and the votes of other Republican Voters are persistently degraded and cancelled in the election of resident Superior Court judges because of such voting customs, practices and procedures. Republican Voters do not have the same opportunity as do Democrats (or, as a practical matter, any opportunity) to elect candidates of their choice for resident Superior Court judge. In fact, their opportunity to do so is eliminated by the voting customs, practices and procedures complained of herein, which were designed for and were and are maintained for such purpose by defendants and their predecessors in office.

32. The proportion of all voters who are Republican Voters varies widely throughout the State of North Carolina. For example, at the time of the 1984 general election, 26% of all voters were registered Republicans, 70% were registered Democrats, and 4% were registered to vote but unaffiliated with either party. In the 1984 general election, approximately 46% of all voters who voted for Superior Court judges voted for the Republican candidates, and approximately 54% voted for the Democratic candidates. In the 24th Judicial District, however, 54% of the voters who voted for Superior Court judge voted for the Republican candidate for Superior Court judge for that district and 46% voted for the Democratic candidate. Similarly, in what were then the 15A, 17B, 18, 19A, 19B, 21, 22, 23, 24, 25, 26, 27A, 28 and 29 Judicial Districts, a majority of voters who voted for Superior

Court judge voted for the Republican candidates. No Republican resident Superior Court judges were elected because of the structural dilution of Republican votes by the voting customs, practices and procedures complained of herein.

33. At the time of the 1986 general election, 27% of all voters were registered Republicans, 69% were registered Democrats and 4% were registered to vote unaffiliated with either party. In the 1986 general election, approximately 43% of all voters who voted for resident Superior Court judges voted for the Republican candidates and approximately 57% voted for the Democratic candidates. In what was then the 26th Judicial District, however, 52% of the voters who voted for resident Superior Court judge voted for the Republican candidate for Superior Court judge for that district and approximately 48% voted for the Democratic candidates. Similarly, in what were then the 19A, 19B, 22, 23, 24, 25, 26, 27A and 29 Judicial Districts, a majority of voters who voted for resident Superior Court judge voted for the Republican candidates. No Republican resident Superior Court judges were elected because of the structural dilution of Republican votes by the voting customs, practices and procedures complained of herein.

34. Since 1968, 10 Republicans have run for resident Superior Court judge. In 4, or 40%, of these contests, the Republican candidate would have been successful if resident Superior Court judges were elected by the qualified voters of the judicial district in question, rather than by statewide election. Since 1900, no Republican has been elected resident Superior Court judge in North Carolina because of the voting customs, practice and procedures complained of herein. The custom or practice of state-wide election of resident Superior Court judge has

been imposed and maintained by the defendants and their predecessors in office for the purpose and with the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

35. Arthur S. Beckhan, Jr., was a registered Republican Voter in the 22nd Judicial District. In 1968, he was the Republican candidate for resident Superior Court judge for the 22nd Judicial District. In that election, he received a state-wide total of 597,234 votes and his Democratic opponent received a total of 763,487 votes. In the 22nd Judicial District, however, Beckham received 38,823 votes and his Democratic opponent received only 33,138 votes. But for the requrement of statewide election of resident Superior Court judges imposed by the defendants or their predecessors in office, Beckham would have been elected.

36. The terms of regular Superior Court judges have been so established so that the dates for their elections primarily occur in non-Presidential election years. For example, in 1982, 27 Superior Court judges were up for election and in 1986, 22 were up for election. In contrast, in 1980, only 8 were up for election and, in 1984, only 8 were up for election. The terms for resident Superior Court judges have been so established for the purpose and with the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

37. In North Carolina, the General Assembly has been consistently and overwhelmingly controlled by Democrats in numbers far in excess of the proportionate voting strength of Democratic voters. Through the gerrymandering of legislative district lines and other voting customs, practices and procedures such as (1) large multimember districts with little or no community of

interest other than a preponderance of Democratic voters and the submergence of Republican Voters therein, (2) numbered seats, (3) ballot counting rules which, until recently, canceled crossover votes, (4) manipulation of tax checkoff campaign funds, (5) ballot position rules, (6) closed primary rules, (7) runoff primaries, (8) anti-single shot voting rules, (9) rotation agreements and (10) mal-apportionment of state resources, the votes of Republican Voters have been persistently degraded and diluted in the election of members of the General Assembly and the influence of Republican Voters on the political process as a whole has been and is consistently degraded. The consistent and overwhelming control of the General Assembly by Democrats far in disproportion to Democratic voting strength is evidence that the electoral system is arranged in such a manner that will consistently degrade the influence of Republican Voters on the political process as a whole.

38. In the General Assembly, Republican members are discriminated against and humiliated by customs and practices imposed by the overwhelming Democratic majority such as (1) being segregated in the rear of the Assembly chambers as racial minorities were on public transportation and places of public assembly in the past, (2) having their proposed laws receive no fair or impartial consideration, (3) having their proposed laws substituted by substantially identical proposed laws with Democratic sponsors, (4) being denied seats on committees in proportion to their relative strength in the General Assembly, (5) being denied any influence in the selection or appointment of legislative staff and, (6) being denied the same level of legislative services enjoyed by Democrats. These specific items of discrimination and humiliation are evidence that the electoral system is arranged in such a

manner that will consistently degrade the influence of Republican Voters on the political process as a whole.

39. In North Carolina, the Governor has no veto power and is unable to operate as a constitutional check or balance on the unbridled power of the overwhelming control of the General Assembly by Democrats. Despite the fact that opinion polls indicate that a majority of all voters in North Carolina favor the gubernatorial veto, the General Assembly persistently refuses to adopt a constitutional amendment providing for the veto and even refuses to allow a referendum on the issue. The refusal of the Democratic General Assembly to adopt the gubernatorial veto or to allow a referendum on the issue is evidence that the electoral system is arranged in such a manner that will consistently degrade the influence of Republican voters on the political process as a whole.

40. When the Governor is a Republican, which has occurred only twice in this century, the Democratic controlled General Assembly regularly and consistently passes laws which deprive the Governor of his historic and traditional powers, even to the point of depriving him of his power to name his own legal counsel when he challenges the same, and other arbitrary, capricious and unconstitutional legislation; instead, the General Assembly imposes upon him the legal representation of the Attorney General who is a Democrat and who controls litigation in a manner contrary to the desires and policies of the Governor. Similarly, Chapter 509 abolished the position of Special Superior Court Judge, which positions were filled by appointment by the Governor, effective December 31, 1988, and even sought to deprive the Governor of his appointive power until that date by purporting to continue in office the Democrats whose terms were due to expire on June 30, 1987. The deprivation of the Governor's historic

and traditional powers when he is a Republican is evidence that the electoral system is arranged in such a manner that will consistently degrade the influence of Republican Voters on the political process as a whole.

41. The North Carolina congressional delegation has been consistently and overwhelmingly controlled by Democrats in numbers far in excess of the proportionate voting strength of Democratic voters, through the gerrymandering of congressional district lines which, for example, include in such districts counties with little community of interest, exclude from such districts counties which have communities of interest, shift counties in and out of districts to reduce the name recognition value of incumbent Republicans and other similar devices. Such gerrymandering is possible because of the consistent and overwhelming control of the General Assembly by Democrats and the lack of the gubernatorial veto. The consistent and overwhelming control of the congressional delegation by Democrats far in excess of the proportionate voting strength of voters is evidence that the electoral system is arranged in such a manner that will consistently degrade the influence of Republican Voters on the political process as a whole.

42. The State of North Carolina has no strong policy favoring statewide election of resident Superior Court judges. In fact, statewide election chills the desire of Republicans to be candidates for resident Superior Court judge and the ability of Plaintiff NCGOP to recruit candidates for resident Superior Court judge. In the 1984 and 1986 general elections, for example, of 40 resident Superior Court judgeships up for election, only 4 were contested. Since 1968, of 181 resident Superior Court judgeships up for election, only 10 have been contested. As a result,

statewide election of resident Superior Court judges chills public debate on issues of public importance.

43. The North Carolina Code of Judicial Ethics prohibits candidates for resident Superior Court judge from discussing their views on disputed legal or political issues, such as their views regarding the death penalty or other issues of public importance. As a result, contested races, when they occur, are entirely controlled by the party voting preference and habit of the electors statewide. Thus, the overwhelming statewide registration advantage enjoyed by the Democratic party guarantees the election of the Democratic candidate, and in the context of the Code of Judicial Ethics, chills public debate on issues of public importance.

44. The carefully created structure of statewide election coupled with the prohibitions on effective campaigning imposed by the Code of Judicial Ethics also chills the ability of Republican candidates to raise campaign funds in order to promote name recognition and thereby ameliorate and overcome the statewide Democratic registration advantage.

45. As a result of all the foregoing factors, only a very small number of voters, if any, have any knowledge about the candidates for resident Superior Court judge outside the Judicial District in which a particular voter resides. Predictably, the above pled factors and the lack of voter knowledge chill all voters in the exercise of the electoral franchise and result in a marked decrease in the percentage of voters who bother to vote in the judicial races. For example, in the 1984 general election, a total of 2,226,727 voters voted in the election for Governor but on 1,886,020 voters voted in the contested election for resident Superior Court judge for the 24th Judicial District and only 1,945,656 voters voted in the contested election

for resident Superior Court judge for the 2nd Judicial District. Similarly, in the 1986 general election, a total of 1,591,330 voters voted in the election for U.S. Senator but only 1,400,751 voters voted in the contested election for resident Superior Court judge for the 2nd Judicial District. Thus, the voting customs, practice and procedures complained of herein chill public debate on issues of public importance and chill the exercise of the electoral franchise.

VIOLATIONS

46. The adoption and maintenance of statewide election of resident Superior Court judges was and is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole. Statewide election of resident Superior Court judges is a voting custom, practice or procedure which is part of a complete electoral system which is arranged in a manner that is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole.

47. The custom, practice or procedure of requiring that candidates for resident Superior Court judge run for specific judgeships ("numbered posts") instead of running at-large for all judgeships up for election in a given year has no authority in law and is contrary to the provisions of N.C.G.S. §163-1(a) and (b). The adoption and maintenance of numbered posts was and is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole. Numbered posts is a voting custom, practice or procedure which is part of a complete electorial system which is arranged in a manner that is intended consistently to degrade, and has the effect of

consistently degrading, the influence of Republican Voters on the political process as a whole.

48. The use of district, rather than statewide, nomination for resident Superior Court judges has no authority in law and is contrary to the provisions of N.C.G.S. §163-1. The adoption and maintenance of district nomination was and is an integral part of the "numbered post" system and was and is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole. District nomination of resident Superior Court judges is a voting custom, practice and procedure which is part of a complete electoral system which is arranged in a manner that is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole.

49. The requirement that a candidate for resident Superior Court Judge must reside in the Judicial District for which he seeks election before he can file a notice of candidacy is a voting custom, practice and procedure which, by itself and as a part of a complete electoral system, is arranged in a manner that is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole.

50. The voting customs, practices and procedures complained of herein, alone and in combination with the other facts alleged herein, are intended to and result in the overwhelming predictability of the success of Democratic candidates for resident Superior Court judge over Republican candidates and were and are intended to and did and do constitute structural dilution of the voting franchise

of Republican Voters in violation of the Fourteenth Amendment to the United States Constitution.

51. The voting customs, practices and procedures complained of herein, alone and in combination with the other facts alleged herein, are intended to and restrict the free exercise of the fundamental rights of free speech and association in violation of the First Amendment to the United States Constitution.

RELIEF

Wherefore Plaintiffs pray for:

1. A declaration that the voting customs, practices and procedures complained of herein constitute unlawful structural dilution of the voting franchise of Republican Voters and an unlawful restriction of their fundamental rights of freedom of speech and association.

2. A preliminary and permanent injunction prohibiting the defendants from conducting elections for resident Superior Court judge under the existing system and an order that such elections be conducted by judicial district (without a candidacy residency requirement) for both nomination and election in such a manner as does not unlawfully discriminate against Republican candidates and Voters.

3. The costs of this action, including reasonable attorneys' fees.

4. Such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

/S/ C. ALLEN FOSTER
C. Allen Foster

/S/ CHARLES B. ROBSON, JR.
Charles B. Robson, Jr.

/S/ ROBERT G. MCIVER
Robert G. McIver

Attorneys for Plaintiffs

OF COUNSEL:

FOSTER, CONNER, ROBSON & GUMBINER, P.A.
104 North Elm Street
P. O. Drawer 20004
Greensboro, North Carolina 27420
919/273-1733

and

700 Raleigh Federal Building
One Exchange Plaza
P. O. Box 786
Raleigh, North Carolina 27602
919/832-4111